LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 17 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 830

GRAND RIVER DAM AUTHORITY, a Body Corporate,
Petitioner,

vs.

NATIONAL GYPSUM COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Q. B. Boydstun
General Counsel, Grand River Dam Authority

Vinita, Oklahoma
Counsel for Petitioner

Of Counsel:
Horace D. Ballaine
Samuel Hess Crossland
James R. Ryan
711 First National Building
Tulsa, Oklahoma

E. L. Mendenhall, Inc., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3080

INDEX

Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	18
Appendix	A1

Citations

CASES

Bartlesville v. *Corporation Commission*, 82 Okl. 160, 199 Pac. 396 (1921)	12
City of Pawhuska v. *Pawhuska Oil & Gas Co.*, 64 Okl. 214, 166 Pac. 1058 (1917), *error dismissed*, 250 U.S. 394, 39 S. Ct. 526, 63 L. Ed. 1054	12
Federal Crop Insurance Corporation v. *Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947)	17
Home Telephone & Telegraph Company v. *Los Angeles*, 211 U.S. 265, 29 S. Ct. 50, 53 L. Ed. 176 (1908)	17
International Brotherhood of Electrical Workers v. *Grand River Dam Authority*, 292 P.2d 1018 (1950)	3
Midland Realty Co. v. *Kansas City Power & Light Co.*, 300 U.S. 109, 57 S. Ct. 345, 81 L. Ed. 540 (1937)	17
Realty Mortgage & S. Co. v. *Oklahoma Employment Sec. Com'n*, 197 Okla. 308, 169 P.2d 761, 770	11
Rock Island, Arkansas & Louisiana R. Co. v. *United States*, 254 U.S. 141, 41 S. Ct. 55, 65 L. Ed. 188 (1920)	17
Royal Indemnity Co. v. *United States*, 313 U.S. 289, 61 S. Ct. 995, 85 L. Ed. 1361 (1941)	17

Sheldon v. *Grand River Dam Authority*, 182 Okl. 24, 76 P.2d 355 (1938) 3

Union Dry Goods Co. v. *Georgia Public Service Corp.*, 248 U.S. 372, 39 S. Ct. 117, 62 L. Ed. 309 (1919) 17

United States v. *City and County of San Francisco*, 310 U.S. 16, 60 S. Ct. 749, 84 L. Ed. 1050 (1940) 17

STATUTES

17 Okl.St.Ann. §151 *et seq.* 12

17 Okl.St.Ann. §152 6

Oklahoma Constitution, Article 18, §7 ....2, 3, 6, 12, 13, 16, 17

Oklahoma Session Laws 1935, Ch. 70, pp. 350-358, 82 Okl.St.Ann. §§861-880 3

Oklahoma Session Laws 1935, Ch. 70, p. 354, 82 Okla.St. Ann. §868 .....2, 3, 6, 9, 10, 13

Oklahoma Session Laws, 1955, p. 562 11

Appendix

CONTENTS

Opinion of Court of Appeals A1

Judgment of Court of Appeals A15

Order of Court of Appeals Denying Petition for Rehearing A15

Section 8 of Grand River Dam Authority Act A16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. _____

GRAND RIVER DAM AUTHORITY, a Body Corporate,
Petitioner,

vs.

NATIONAL GYPSUM COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Grand River Dam Authority, a body corporate under the laws of the State of Oklahoma, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on October 6, 1965.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Oklahoma (R. 52 and 57) has not been reported and the opinion of the Court of Appeals for the Tenth Circuit has not yet been reported. It is printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was made and entered on October 6, 1965, and a copy is appended to this Petition following the opinion of the Court of Appeals in the Appendix. A Petition for Rehearing was denied on November 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether it is proper for a Court of Appeals to base its ruling upon an argument not suggested, urged, briefed or even anticipated by the parties to the proceedings before it.

2. Whether petitioner is authorized, in establishing and collecting utility rates pursuant to the Grand River Dam Authority Act, to establish contingency and depreciation funds.

3. Whether the legislature of Oklahoma can impliedly sanction actions of an agency created by it which violate an express provision of the Oklahoma Constitution.

4. Whether the Court of Appeals erred in interpreting the provisions of Article 18, §7 of the Oklahoma Constitution.

STATUTES INVOLVED

Section 8 of the Grand River Dam Authority Act, 1933 Okl.Sess.Laws, Ch. 70, p. 354, 82 Okl.St.Ann. §868, is the statute applicable to this case. This section of the Grand River Dam Authority Act has not been amended since its adoption in 1935. Pertinent portions are printed

in the text of this petition. The entire section appears in the Appendix.

Article 18, §7 of the Constitution of the State of Oklahoma is cited in the text.

STATEMENT OF THE CASE

Petitioner is a conservation and reclamation "District" established by the legislature of the State of Oklahoma in the Grand River Dam Authority Act of 1935, Okl.Sess.Laws 1935, Ch. 70, pp. 350-358, 82 Okl.St.Ann. §§861-880, primarily to build and operate a hydroelectric dam upon the Grand River in Northeastern Oklahoma. It is Oklahoma's largest State-owned utility and is the principal supplier of electric power to municipalities, industries and electrical cooperatives in fifteen counties of Northeastern, Oklahoma. In operating its plants and facilities it exercises sovereign power of the State of Oklahoma and its directors, officers and employees are the agents and employees of the State of Oklahoma.[1]

Article 18, §7 of the Constitution of the State of Oklahoma provides, *inter alia,*

> "Nor shall the power to regulate the charges for public services be surrendered. . ."

and Section 8 of the Grand River Dam Authority Act, 82 Okla.St.Ann. §868, requires petitioner (referred to in the Act as the "District"), by its Board of Directors, to:

> ". . . establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished or supplied by the District which fees and charges shall

1. *International Brotherhood of Electrical Workers* v. *Grand River Dam Authority*, 292 P.2d 1018 (1950); *Sheldon* v. *Grand River Dam Authority*, 182 Okl. 24, 76 P.2d 355 (1938).

be reasonable and non-discriminatory and sufficient to produce revenue adequate:

a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

b) To pay the interest on and principal of all bonds issued under this Act (the Grand River Dam Authority Act) when and as the same shall become due and payable;

c) To pay all sinking fund and/or reserve payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable;

d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in subparagraphs (a), (b), (c) and (d), above, the Board shall establish a reasonable depreciation and emergency fund and retire (by purchase and cancellation or redemption) bonds issued under this Act. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act."

On November 6, 1950, petitioner entered into a contract (hereinafter referred to as the "Contract") with respondent (later amended on April 6, 1951) under which petitioner agreed to furnish respondent's requirements of electric power and energy, water, steam and compressed air (R. 6-19, 20-21). The term of the Contract was for a period of twenty-five years.

With respect to rates for electricity and electrical energy, the Contract expressly provided that rates might be from time to time changed by petitioner "only as pro-

vided in the Grand River Dam Authority Act" but that such rates should at all times be "reasonable and non-discriminatory and shall be adequate but not in excess of what may be necessary to fulfill the obligations imposed upon [petitioner] by said Act." The Contract contained no similar provisions dealing with changes in rates for water, steam and compressed air.

On the basis of studies and reports which indicated that the rates being received by petitioner for the sale of electricity, water, steam and compressed air were insufficient to provide the revenues required by the Grand River Dam Authority Act, the Directors of petitioner adopted Resolution No. 3890 (R. 33-40) on January 5, 1960, promulgating new and increased schedules of rates for electricity, water, steam and compressed air. On April 20, 1964, the Directors promulgated Resolution No. 4123 (R. 41-50) further increasing the rates for all utility services. Respondent paid the increased rates under protest and filed this action in the U.S. District Court for the Northern District of Oklahoma seeking refunds for the rates paid for water, steam and air and a determination that petitioner had no authority to change the rates for water, steam or air. No complaint was made as to the increased rates for electricity and respondent did not complain that the rates for water, steam or air were discriminatory or unreasonable—only that petitioner had no power to change such rates at all (See Complaint at R. 1-5). Jurisdiction was based upon diversity of citizenship. When it became apparent that respondent's claims were based solely on the question of petitioner's power, under any circumstances, to make any changes in the rates for water, steam and air, petitioner moved for summary judgment (R. 32) and respondent also moved for summary judgment (R. 51).

The District Court (Bohannon, J.) granted respondent's Motion for Summary Judgment (R. 67) and filed an Order (R. 52-57) indicating that his ruling was based upon the premise that any attempted change in rates for water, steam or air by petitioner would "impair the obligation of [respondent's] contract with [petitioner]" (R. 56).

Petitioner appealed to the Court of Appeals for the Tenth Circuit urging that the provisions of Article 18, §7 of the Oklahoma Constitution, *supra,* precluded it from making any effective contract which would bar proper rate adjustments for utility services when changes should become necessary to maintain revenues adequate for the purposes specified in Section 8 of the Grand River Dam Authority Act, 82 Okl.St.Ann. §868, *supra.*

The Court of Appeals affirmed the judgment of the District Court holding: (1) that the Oklahoma legislature had impliedly approved an administrative construction of the Grand River Dam Authority Act recognizing petitioner's authority to execute long term contracts which do not reserve power to make appropriate rate adjustments; (2) that Article 18, §7 of the Oklahoma Constitution did not apply to petitioner because municipally owned utilities are excluded from the definition of the word "utility" in a statute (17 Okl.St.Ann. §152) which established a regulatory agency to supervise the rates of privately owned utility companies; (3) that when petitioner's Directors in 1950 approved the Contract they had "exercised" (to the exclusion of any later power of review) the legislative rate authority delegated by the Grand River Dam Authority Act; and (4) that petitioner had improperly accrued depreciation and contingency funds in deficit years and had no authority to accrue such reserves except out of excess earnings.

The latter holding is relied upon primarily as the basis for this petition for certiorari because neither party to the action had even suggested any such argument or remotely anticipated such an unsolicited ruling and because the ruling may well jeopardize petitioner's right to collect rates sufficient to establish reserve funds specifically provided for in its outstanding bond indentures.

Petitioner is frank to state that although it regards the opinion of the Court of Appeals as manifestly erroneous in all respects, the errors would not ordinarily give rise to questions entitled to review in this Court by certiorari except for the drastic effects of that part of the Court's opinion which deals with the reserve funds petitioner is legally entitled to establish. That ruling was volunteered by the Court of Appeals sua sponte and without any thought as to its possible effect. Its effect is startling and extends far beyond the instant controversy. It casts doubt on the validity of reserve funds, established for many years under the specific terms of bond indentures. It will imperil petitioner's rights in other rate cases now pending and may well affect future bonds to be issued by the Authority. The ruling perils the economic and industrial future of all of Northeastern Oklahoma at a time when the Legislature is not scheduled to meet until 1967, and legislative relief can not be had until such time.

REASONS FOR GRANTING THE WRIT

A. The Ruling Concerning Petitioner's Right to Establish Reserves Presents a Question of Importance upon Which Petitioner Should Have a Fair Hearing.

Petitioner has already suggested that the surprise holding of the Court of Appeals and the far-reaching and drastic consequences of that ruling are the principal basis for this petition for certiorari. The holding transcends the merits of this particular controversy. By affecting the validity of the reserves which petitioner has established, the opinion affects the entire debt structure of petitioner. With major expansion projects well launched, petitioner is now faced with a challenge going to the very heart of its allowable revenues.

In most cases, this court is right to insist that it not be burdened with cases which merely call upon it to make another judgment as to the correctness or error in non-federal rulings already thoroughly argued and briefed by two lower tribunals. The parties have had their day in court—usually twice. In the instant case, however, petitioner's only day in court on the ruling which most vitally affects its future (and the economic future of a major area of the State of Oklahoma) consisted of a chance to call the attention of the Court of Appeals to its error on a Petition for Rehearing (cursory review at best).[2]

---

2. Review on a Petition for Rehearing in situations where the Court has offered several grounds to support an opinion is most unsatisfactory. Even if the Court of Appeals has become convinced that it erred in one or more respects, it will tend to deny the Petition for Rehearing without comment on the basis that the judgment is supported by other grounds. Such action may leave in force an opinion announcing an erroneous rule of law which has far reaching and tragic consequences. Petitioner suggests that this is what has occurred in the instant case.

Petitioner feels that if it can demonstrate clear and manifest error in the Ruling of the Court of Appeals in its "volunteered" ruling concerning the establishment of proper reserves, the writ of certiorari should be granted in this case even if the Court of Appeals be correct in its other rulings, none of which are nearly so grave or significant to petitioner or the citizens it serves. Petitioner would like to show why the Court of Appeals could not, on the record in this case, have decided the question of what reserves petitioner may establish.

All of petitioner's rate making authority is derived from the above quoted provisions in Section 8 of the Grand River Dam Authority Act. This section requires petitioner not only to establish, but to *collect*, rates which *"shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate*:

"a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

c) To pay all sinking fund *and/or reserve fund payments agreed to be made in respect of any* . . . bonds, and payable out of such revenues, when and as the same shall become due and payable; and

d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf." (Emphasis added)

Thus, under the plain and unambiguous language of the Statute, petitioner is not only authorized, but commanded, to establish *and collect* rates sufficient for such reserve fund payments which may be required in respect to its outstand-

ing bonds. Petitioner is a party to an elaborate bond Indenture which requires mandatory payments to the challenged depreciation and contingency funds but the Indenture was not before the District Court or the Court of Appeals. If petitioner could have introduced the Indenture into the record on its Petition for Rehearing in the Court of Appeals, it would, of course, have done so. Since no one but the panel of the Court of Appeals which heard the case even remotely suspected (or could have suspected) that this issue would arise, the Indenture had not been made a part of the record—nor did the issues framed by the pleadings suggest that it might become relevant.

The Court of Appeals ignored completely the statutory provisions quoted above and commenced its analysis with the statutory words following the really relevant ones. It is true that the sentence following the quoted portion of 82 Okl.St.Ann. §868(d) refers to reserves which are to be established. . . "Out of the revenues which may be received in excess of those required for the purposes specified in subparagraphs (a), (b), (c) and (d)." The latter sentence is, however, operative only after petitioner's rates have brought it sufficient revenues to establish those funds which the Grand River Dam Authority Act absolutely requires it to establish (funds required by its indentures and agreements with bondholders).

The irresponsible action of the Court of Appeals in interjecting this issue into the controversy without any proper foundation or hearing makes this a proper case in which this Court should exercise its general supervisory authority over the administration of justice in the Federal Courts.

B. The Court of Appeals Erred in Ruling That the Oklahoma Legislature Had Impliedly Ratified the Contract.

The opinion of the Court of Appeals held that since the Oklahoma Legislature had amended the Grand River Dam Authority Act in 1955 (Oklahoma Session Laws, 1955, p. 562) without taking any action concerning petitioner's contracts, it had impliedly ratified an administrative construction of the Grand River Dam Authority Act under which petitioner did have the authority, by contract, to put rates for water, steam and air beyond review for long periods of time.

This holding is incorrect because there is no evidence that any of petitioner's contracts ever came to the attention of the Legislature. Petitioner does not publish "reports" concerning its contracts or report them to Legislature periodically nor have there been any prior controversies concerning the instant aspect of any of petitioner's contracts which might have focused legislative attention upon the subject. In the absence of some indication that the question could have come to the attention of the Legislature, or even one of its minor committees, it is absurd to presume any legislative ratification, implied or otherwise, of petitioner's contracts.[3]

---

3. The Oklahoma Supreme Court is familiar with the fact that few of the State's administrative agencies publish reports or otherwise communicate regularly with the Legislature and has not recognized the doctrine of implied legislative ratification of administrative action. This explains why the only authority the Court of Appeals was able to muster to support its holding of implied legislative ratification was a reference to a dissenting opinion by a Justice of the Supreme Court of Oklahoma. (The citation to *Realty Mortgage & S. Co.* v. *Oklahoma Employment Sec. Com'n*, 197 Okl. 308, 169 P.2d 761, 770, in Footnote 3 of the opinion of the Court of Appeals is a reference to the dissenting opinion of Vice Chief Justice Hurst.) Petitioner does publish financial reports which show its reserves and the annual allocations thereto. Thus, if the legislature has impliedly ratified or sanctioned any administrative practice, it has ratified petitioner's practices of allocating funds to depreciation and contingency reserves.

Certainly neither the 1955 or 1957 amendments to the Grand River Dam Authority Act dealt with the subject of contracts or rates. These amendments changed the composition of petitioner's Board of Directors, their terms of office and compensation, the location of the principal office and increased the amount of bonds petitioner might issue, but did not in any manner involve petitioner's rate structure or its contract authority.

In any event, however, the Oklahoma Constitution prohibits any one on behalf of the State from contracting away the State's sovereign power to regulate the charges for public services. Article 18, §7 provides:

> "Nor shall the power to regulate the charges for public services be surrendered; . . ."

The Oklahoma Supreme Court has applied this constitutional provision to bar attempts by municipalities to contract with private utilities and place rates for utility services beyond the reach of the State's continuing, sovereign power of regulation. *Bartlesville* v. *Corporation Commission,* 82 Okl. 160, 199 Pac. 396 (1921); *City of Pawhuska* v. *Pawhuska Oil & Gas Co.,* 64 Okl. 214, 166 Pac. 1058 (1917), *error dismissed,* 250 U.S. 394, 39 S. Ct. 526, 63 L. Ed. 1054. The Court of Appeals ignored the Constitutional provision by finding that petitioner was not a "utility" as defined in the Statute which created a Corporation Commission and delegated to it the power to regulate utility charges of privately owned utilities. 17 Okl.St.Ann. §151 *et seq.*

This merely misconceives the regulatory scheme adopted in Oklahoma. The Corporation Commission of Oklahoma exercises rate-regulatory authority over privately owned utilities. The Legislature has not seen fit to commit the regulation of rates by municipally owned and

publicly owned utilities to the same body which regulates private utilities. This scheme does not represent a legislative determination that petitioner's charges for its services are not "charges for public services" under the Constitutional provision.

When petitioner was established as a body politic and as an agency of the State in the Grand River Dam Authority Act, the Oklahoma Legislature plainly recognized that its charges were subject to Article 18, §7 of the Constitution. The last paragraph of Section 8 of the Grand River Dam Authority Act, 82 Okl.St.Ann. §868, immediately follows the paragraphs and subparagraphs which prescribe the rates petitioner must charge. It reads:

> "Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c) and (d) of this Section 8, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged." Laws 1935, p. 354, §8.

This paragraph is a clear reference to Article 18. §7 of the Oklahoma Constitution and is a recognition by the Legislature that it was as powerless to surrender the State's

rate making authority as petitioner or any other party would be.

Finally, the parties themselves recognized that by virtue of the Oklahoma Constitution and the Grand River Dam Authority Act, petitioner had a continuing duty to change its rates from time to time to keep them in compliance with the legislative mandate. Respondent has paid the increased electric rates without question[4] and has challenged only the increased rates for water, steam and air. Yet the provision of the Contract (paragraph No. 16, R. 9) which authorizes changes in electric rates recognizes that petitioner has an *obligation* to make changes. It provides:

> "Rates Subject to Change
>
> 16. The schedule of electric rates and charges as herein set forth may be changed by the Authority from time to time only as provided by the Grand River Dam Authority Act (Title 82, Sec. 861 et seq., O. S. 1941, as amended and supplemented as of the date on which this agreement is executed by the Authority), which rates and charges shall at all times be reasonable and nondiscriminatory and shall be adequate but not in excess of what may be necessary to fulfill the *obligations* imposed upon the Authority by said Act. Any change in the Authority's schedules of rates shall be applied to all customers of the Authority in a reasonable and nondiscriminatory manner. The Authority's costs of redeeming bonds prior to maturity will not be considered as a part of operating costs and electric rates

4. Respondent's action in raising no question concerning the increased rates for electricity is certainly no less than an admission on its part that the revenues received by petitioner had become insufficient for the statutory purposes. Absent such a situation, petitioner could not have raised electric rates as the contract with respondent permitted petitioner to raise rates only in such a situation. Respondent's admission in this respect also explains why petitioner could not reasonably have anticipated a ruling by the Court of Appeals which finds, in effect, that petitioner's revenues were adequate without any raise in rates.

hereunder will not be increased for this purpose." (Emphasis added)

The error of the Court of Appeals in the above respect, together with its much graver error in ruling upon the reserves petitioner is legally entitled to establish justifies an exercise of this Court's reviewing authority.

C. The Court of Appeals Erred in Deciding That the Twenty-Five Year Contract Was an Exercise of the State's Rate-Making Authority Which Was Binding for Such Term.

The Court of Appeals decided that petitioner was obligated "at the time the contract was entered into to determine what rates in its [petitioner's] considered judgment would be adequate to meet the requirements of §868 during the term of the contract and fix the applicable rates accordingly." The Court stated that the fact, if it be a fact, that actual experience showed the initial judgment to have been faulty over the life of the Contract "does not retroactively make the initial determination improper or unlawful and does not render void the contract rates."

Petitioner does not contend that the contract is meaningless or "retroactively void." It contends that the contract rates remained valid at all times until that time *when such rates were no longer adequate to meet the statutory requirements of the Act.* Precisely at that time petitioner had a duty under the statute to make appropriate changes to bring the rates into line with the statutory mandate which required petitioner, not only to establish, but to collect, rates and other charges sufficient to produce revenue adequate for the purposes set forth in the Grand River Dam Authority Act. Petitioner was prepared to meet the burden of showing that the contract rates were no longer adequate for such purposes and that

the rates for water, steam and air had become discriminatory in that such rates were not bearing their fair proportion of petitioner's costs. When respondent took the position in the District Court that the only question involved was the legal right of petitioner to change rates for water, steam and air for any reason at all, both parties moved for summary judgment and such proof became unnecessary.

The result of the opinion of the Court of Appeals is to force petitioner to maintain until 1975 discriminatory rate schedules under which all users of electricity must unfairly bear the burden of its losses in furnishing water, steam and air to respondent. Since the opinion of the Court of Appeals was announced, the City of Pawnee, Oklahoma, has amended its pleadings in a suit between it and petitioner in the District Court of Pawnee County, Oklahoma, to allege that it is being required to bear an unfair portion of petitioner's costs of service by reason of the unreasonably low rates charged to respondent for water, steam and air. Other users have threatened similar action so that the opinion of the Court of Appeals has jeopardized petitioner's entire rate structure as well as its debt structure. The matter thus affects the entire population and economy of Northeastern Oklahoma, which is wholly dependent upon petitioner for major utility services.

The purpose of Article 18, §7 of the Oklahoma Constitution was to prevent officers and agents of the State from binding the State and its agencies to contracts which put review of utility rates beyond review. The effect of the opinion of the Court of Appeals is to do just that—to put the rates charged to respondent completely beyond review until 1975.

There can be no question but that respondent was fully charged with notice of all limitations upon the authority of petitioner and its officers, as agents and employees of the sovereign, *Rock Island, Arkansas & Louisiana R. Co.* v. *United States,* 254 U.S. 141, 41 S. Ct. 55, 65 L. Ed. 188 (1920); *United States* v. *City and County of San Francisco,* 310 U.S. 16, 60 S. Ct. 749, 84 L. Ed. 1050 (1940); *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 61 S. Ct. 995, 85 L. Ed. 1361 (1941), and that the sovereign is not bound by rules of estoppel or apparent agency when its officers exceed limitations upon their authority. See *Federal Crop Insurance Corporation* v. *Merrill,* 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947). The provisions of Article 18, §7 of the Oklahoma Constitution and the rate standards of the Grand River Dam Authority Act are clear and unambiguous limitations upon petitioner's authority to make contracts establishing rates which, either initially or subsequently, fail to meet the legislatively established standards.

It is equally clear that contracts establishing utility rates do not put the rates so established beyond the sovereign power of the State to abrogate them, *Union Dry Goods Co.* v. *Georgia Public Service Corp.,* 248 U.S. 372, 39 S. Ct. 117, 62 L. Ed. 309 (1919); *Midland Realty Co.* v. *Kansas City Power & Light Co.,* 300 U.S. 109, 57 S. Ct. 345, 81 L. Ed. 540 (1937), and this Court has recognized the well established rule that the surrender, by contract, of a power of government, is a very grave act requiring specific authority which must "clearly and unmistakably appear". *Home Telephone & Telegraph Company* v. *Los Angeles,* 211 U.S. 265, 29 S. Ct. 50, 53 L. Ed. 176 (1908).

The opinion of the Court of Appeals ignores, even violates, these settled principles of law which protect the State against the acts of its agents who exceed the authority committed to them.

CONCLUSION

The ruling of the Court of Appeals far transcends this particular case. The most serious, and demonstrably erroneous, portion of its ruling may well prove chaotic in its effect upon the economy of a large portion of a sovereign State. Rulings which have such effect should be accorded at least one review even though the substantive question may be one of State law. This court has a continuing concern for the manner in which justice is dispensed in the Federal appellate Courts. The case, therefore, is one of those cases where the Court of Appeals has so departed from settled rules of State law as to justify a hearing on certiorari and the writ should be granted.

Respectfully submitted,

Q. B. BOYDSTUN
General Counsel, Grand River
Dam Authority
Vinita, Oklahoma

JAMES R. RYAN
SAMUEL HESS CROSSLAND
711 First National Building
Tulsa, Oklahoma
Counsel for Petitioner

United States Court of Appeals

TENTH CIRCUIT

No. 8063

GRAND RIVER DAM AUTHORITY,
a body corporate,
Appellant,

v.

NATIONAL GYPSUM COMPANY,
a corporation,
Appellee.

Appeal from the United States District Court
for the Northern District of Oklahoma

(Filed United States Court of Appeals, Tenth Circuit,
October 6, 1965, /s/ Robert O. Cartwright,
Clerk.)

James R. Ryan (Q. B. Boydstun, Horace D. Ballaine, Hess Crossland, and Conner, Winters, Randolph & Ballaine were with him on the brief) for Appellant.

Remington Rogers (Rogers, Donovan & Rogers were with him on the brief) for Appellee.

Before PHILLIPS, LEWIS and BREITENSTEIN, Circuit Judges.

PHILLIPS, Circuit Judge.

National Gypsum Company[1] brought this action against Grand River Dam Authority[2] to recover excess

1. Hereinafter called National.
2. Hereinafter called the Authority.

charges alleged to have been paid under duress by National to the Authority for water and steam furnished National by the Authority under the written contract referred to hereinafter. Both parties moved for a summary judgment. From a summary judgment in favor of National, the Authority has appealed.

The Authority is a conservation and reclamation district created by the Oklahoma Legislature in 1935 to provide flood control and to store, preserve and distribute "the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation and development of the forests, water and hydro-electric power of the State of Oklahoma." (Session Laws of 1935, Chapter 70, Article 4, § 1)

The contract above referred to was entered into between the Authority and National on November 6, 1950, and in part here material provides:

> "Whereas, the Consumer [National] plans to locate, construct, maintain, and operate an industrial plant or plants upon and/or adjacent to the Authority's Chouteau Steam Plant property at the Oklahoma Ordinance Works near Pryor in Mayes County, Oklahoma; and
>
> "Whereas, the Consumer will require for use in operating and maintaining said plant or plants electric power and energy, processed steam, raw and treated water, compressed air, and certain sanitation facilities; and
>
> "Whereas, the Authority is able and can furnish to the Consumer its requirements of electric power and energy, processed steam, raw and treated water, compressed air and certain sanitation facilities;
>
> * * * *

"Article I

Electric Power and Energy

"Service

1. The Authority shall sell and deliver to the Consumer, and the Consumer shall purchase and receive from the Authority electric power * * * all in accordance with the terms and conditions of this Contract.

* * * *

"Rates

8. The Consumer agrees to pay the Authority monthly, each month during the period of this Contract for power and electric energy, in accordance with the following schedule of rates:

* * * *

"Article II

Water

"Service

1. The Authority shall sell and deliver to the Consumer the Consumer's requirements of (1) treated water * * * and (2) raw water * * *.

* * * *

"Rates

3. Consumer agrees to pay the Authority * * * for water in accordance with the following schedules of rates:

* * * *

"Article III

Steam

"Service

1. The Authority shall sell and deliver to the Consumer and the Consumer shall purchase and re-

ceive from the Authority the Consumer's requirements of dry saturated steam * * *.

* * * *

"Rates

3. The Consumer agrees to pay the Authority monthly each month during the period of this Contract for said dry saturated steam at the rate of 20¢ per thousand pounds of steam delivered in accordance with Consumer's requirements provided no monthly bill for dry saturated steam shall be less than $2,500.00.

"Article IV

Compressed Air

"Service

1. The Authority shall sell and deliver to the Consumer, and the Consumer shall purchase and receive from the Authority the Consumer's requirements of compressed air * * *.

* * * *

"Rates

3. The Consumer agrees to pay the Authority monthly each month during the period of this Contract for said compressed air at the rate of 3¢ per thousand cubic feet of free air.

* * * *

"Article VI

General

* * * *

"Term of Agreement

9. This contract shall become effective on the complete execution of the same and shall continue

from this effective date for a period of twenty-five (25) years. It will thereafter remain in effect until cancelled by two (2) years' written notice by either party. * * * Nothing herein contained shall be construed as limiting the rights of modification or termination at any time as specified in the contract. It is further understood that each of the services under this contract shall be contingent upon the erection by consumer of the industrial plant hereinbefore described and shall begin on the dates required by the Consumer for its production operations.

* * * *

"Most Favored Consumer Clause

14. The Authority shall give the Consumer notice of, and shall give the Consumer the benefit of, any lower rate schedules and/or more favorable terms and/or more favorable conditions of purchase made available to any of its other industrial customers of the same class at any time during the terms of this agreement."

The contract provides that the schedule of electric rates and charges set forth in the contract may be changed by the Authority from time to time but that such rates and charges shall at all times be reasonable and nondiscriminatory and shall be adequate but not in excess of what might be necessary to fulfill the obligations imposed upon the Authority by the Act under which it was created. The contract contains no provision for changing the rates for water, steam and compressed air and under the provisions of the contract the charges therefor were to remain unchanged during the life of the contract.

By resolution adopted January 5, 1960, the Authority increased its rates for electric power, steam and water to be effective April 1, 1960. Such resolution in part provided:

"Whereas, Section 7.10 of the Indenture, entered into between the Authority and the Marine Midland Trust Company of New York, as Trustee, dated as of October 1, 1948, as follows:

"'The Authority covenants that it will, * * * prepare, adopt and file with the Trustee * * * a schedule of rates, tolls, rents and other charges for electrical energy and for any and all other commodities, services and facilities to be furnished or supplied by the Authority from the System, which are fair, reasonable and nondiscriminatory, and which are calculated on the basis of all available estimates (and with due allowance for contingencies) to yield funds at least sufficient:

"'(a) To meet the requirements of Article IV with respect to the amount from time to time to be set aside in each of the special funds provided for in Article IV; and

"'(b) To meet all other obligations of the Authority hereunder or otherwise.'"

National was advised by the Authority of such rate changes applicable to it and National thereafter paid such increased rates on water and steam under protest.

By resolution adopted April 20, 1964, the Authority again increased its rates for electric power, water and steam to be effective July 1, 1964. That resolution in part provided:

"Whereas, Section 8.1 C of the Grand River Dam Authority's Bond Resolution No. 4010 creating and establishing an issue of $50,000,000 in Revenue Bonds, adopted December 5, 1961, is as follows:

"'The Authority shall fix, establish, maintain and collect rates and charges for electric power and energy and other services, facilities and commodities sold, furnished or supplied through the facilities of

the system, which shall be fair and nondiscriminatory and adequate to provide the Authority with revenues sufficient to pay the costs of the proper operation, maintenance and repair of the System, and also for the payment of all costs, expenses and charges specified in paragraph B above, and any and all other amounts which the Authority may now or hereafter become obligated to pay or set aside from said revenues by law or contract.'"

The Authority advised National of the last-mentioned change in rates applicable to it and National thereafter paid the increased rates for water and steam under protest.

On September 17, 1964, National filed its complaint in this action in which it alleged that the increase in rates of water and steam by the Authority was a breach of the contract and that it paid such rates for water and steam furnished it under protest. It further alleged that prior to March, 1950, it was operating numerous plants economically located for sources of raw material and for economical transportation of its finished products to various markets throughout the United States, and that to meet the growing needs of its business National, prior to March, 1950, decided to locate a new paper plant at some convenient point in northeastern Oklahoma; that as a result of negotiations between the Authority and National, the Authority agreed to sell to National a certain industrial site for the construction of such paper plant, and as a part and parcel of such transaction, to induce National to purchase such industrial site and construct its plant thereon and to become a customer of the Authority, the Authority agreed to furnish National with its requirements of electrical energy and agreed to sell to National its requirements of water, steam and air under the specific

terms and conditions set forth in the contract referred to above.

National further alleged that in reliance upon such contract and the performance thereof by the Authority, National purchased the industrial site from the Authority and at great expense constructed a substantial plant thereon and from the date of its completion has continued to operate such industrial plant; that in the operation thereof, National continuously requires not only a dependable source of electric power but also steam, water and air in substantial quantities; and that it is necessary for National to operate such plant continuously to enable it to perform its contract with its various customers.

The trial court held that the Authority had plenary power to operate, manage and conduct its business including the power to establish rates and charges for water and steam to be furnished by it for a definite term, and that it had the power to enter into a contract to furnish water and steam at such rates throughout such term. It concluded that the rate changes which the Authority undertook to make in 1960 and 1964 violated the contract referred to above.

82 Okl. St. Ann. § 868 provides as follows:

> "The Board [of the Dam Authority] shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate:
>
> "(a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

"(b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

"(c) To pay all sinking fund and/or reserve fund payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable; and

"(d) to fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d) above, the Board shall establish a reasonable depreciation and emergency fund, and retire * * * bonds issued under this Act, or apply the same to any corporate purpose. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act.

"Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c) and (d) of this Section * * *, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged."

82 Okl. St. Ann. § 862(n) grants to the Authority the power "to make contracts and to execute instruments necessary or convenient to the exercises of the powers, rights, privileges and functions conferred upon it."

On December 18, 1950, the Authority entered into a contract with the City of Pryor, Oklahoma, for the sale of water at specified rates for a definite term. That contract made no provision for changing such rates during the term. On January 9, 1951, it entered into a contract with the Coronado Manufacturing Company for the sale of electric energy, steam and water for specified rates set forth in the contract. That contract provided for the changing of the rates for electric energy by the Authority but made no provision for changing the rates for water and steam which were fixed for a definite term under the contract. And on October 3, 1952, the Authority contracted with the City of Chouteau, Oklahoma, for the sale of water for a definite term, at rates specified in the contract. That contract contains no provision for the changing of the rates by the Authority and such rates were fixed for a definite term by the contract.

While the Authority also entered into other contracts in which it reserved the power to change rates, it is clear that the Authority in 1950, 1951 and 1952, construed Section 868, supra, as giving it the power to establish rates and charges for water and steam for a fixed period and Section 862(n), supra, as giving it the power to contract to furnish water and steam for such fixed period at such unchangeable rates. The Act creating the Authority and defining its powers was amended in 1955 (Oklahoma Session Laws, 1955, p. 474) and again in 1957 (Oklahoma Session Laws, 1957, p. 562). In neither of such amendatory acts did the Legislature amend or change Section 862(n), supra, or limit or take away the power of the Authority to establish and

contract for fixed rates for a definite period which the Authority had theretofore exercised and which constituted an administrative construction of the Act. The Legislature therefore impliedly approved such administrative construction of the Act made by the Authority.[3]

The Authority contends that Article 18, Section 7 of the Oklahoma Constitution[4] prohibits it from entering into a contract which establishes fixed rates, relying upon City of Bartlesville v. Corporation Commission, 82 Okl. 160, 199 P. 396; City of Pawhuska v. Pawhuska Oil and Gas Co., 64 Okl. 214, 166 P. 1058, writ of error dismissed, 250 U.S. 394; and American Indian Oil & Gas Co. v. George F. Collins & Co., 157 Okl. 49, 9 P.2d 438, as supporting their contention. We think those cases are not controlling in the instant case. In City of Bartlesville v. Corporation Commission, supra, the Oklahoma Supreme Court held that the Corporation Commission had the power to change the rates charged by a non-municipal gas company in Bartlesville notwithstanding a home rule city charter provision authorizing the city to fix and regulate such rates. In City of Pawhuska v. Pawhuska Oil & Gas Co., supra, the Oklahoma Supreme Court held that the rate for gas supplied to the inhabitants of Pawhuska by a non-municipal gas company could be changed by the Corporation Commission notwithstanding a provision in the franchise granted by the City to the gas company prior to the time the Corporation Commission was granted power by the Legislature to regulate the rates of public utilities, establishing a maximum rate for gas. And in American Indian Oil and Gas

---

3. Realty Mortgage & S. Co. v. Oklahoma Emp. Sec. Com'n., 197 Okl. 308, 169 P.2d 761, 770.

4. Article 18, Section 7 of the Oklahoma Constitution provides in part as follows:

"Nor shall the power to regulate the charges for public services be surrendered; * * *."

Co. v. George F. Collins & Co., supra, the Oklahoma Supreme Court held that a ten-year contract between a non-municipal gas company and a private consumer which established a fixed rate for gas was binding upon the parties so long as no rate had been established by the Corporation Commission, but ceased to be effective as to rates when the Corporation Commission had established rates.

Those cases all involved rate changes made by the Corporation Commission. The rates charged by public utilities in Oklahoma are controlled and regulated by the Corporation Commission.[5] But the Authority is a "body politic"[6] and as such it is expressly excluded from the statutory definition of a public utility[7] and its rates and charges are not subject to control or regulation by the Corporation Commission. The only limitations upon the rate making powers of the Authority are those imposed by the Legislature which appear in 82 Okl. St. Ann. § 868, supra.

Furthermore, each of the cases relied upon by the Authority involve an attempt by the user to fix rates so as to prevent the duly constituted rate making agency designated by the Legislature from performing its rate making duties. In the instant case the Legislature designated the Authority as the agency to fix its own rates, and any rates set by it, whether by contract or otherwise, if set according to law are subject to change only by the Legislature. Hence there was no surrender of the power to regulate as there was in the cases cited by the Authority. Rather there was an exercise of such power.

---

5. 17 Okl. St. Ann. § 152.

6. 82 Okl. St. Ann. § 861; International Brotherhood v. Grand River Dam Auth., ... Okl. ....., 292 P.2d 1018, 1019.

7. 17 Okl. St. Ann. § 151.

The Authority further contends that its revenues are inadequate to meet the requirements of § 868, supra, and that therefore the contract is void. We do not agree.

The only evidence in the record as to the insufficiency of the fees and charges made by the Authority was an exhibit which tabulated revenue and expenses for a 5-1/2 year period. That exhibit shows in part the following:

Year	Outstanding Bonds	Total Revenues	Operation & Maintenance	Debt Service
1959	20,767,000.00	4,459,498.46	3,100,320.39	952,446.27
1960	20,951,000.00	4,912,646.18	3,399,790.52	978,016.21
1961	50,000,000.00	4,964,426.27	3,034,510.26	1,056,738.19
1962	50,000,000.00	5,390,983.20	3,870,211.48	643,100.00
1963	50,000,000.00	5,963,719.16	5,628,525.84	643,100.00
1964 (6 mo)	50,000,000.00	3,910,661.09	2,825,829.69	1,336,255.36
Total		29,601,934.36	21,859,188.18	5,609,656.03

Year	Debt. Ser. Res. Fund	Contingency Fund	Depreciation	Gain or Deficit*
1959	35,790.30	50,000.00	607,035.80	286,094.30*
1960	63,695.72	50,000.00	593,070.42	171,926.69*
1961	88,036.95	50,000.00	585,674.55	139,466.32
1962	283,680.63	250,000.00	614,651.16	270,660.07*
1963	283,680.63	250,000.00	617,660.68	1,459,247.99*
1964 (6 mo)	141,840.32	125,000.00	328,803.86	847,068.14*
Total	906,724.55	775,000.00	3,346,896.47	2,895,530.87*

It should be noted that § 868, supra, permits the establishment of depreciation and emergency funds only "out of the revenues which may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d)" of § 868, yet in each of the years in which the above tabulation shows a deficit, there were set up as expense items depreciation and contingency reserve. We think that a contingency fund and an emergency fund are the same.

Revenues in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d) of § 868, supra, were not available in the amounts charged as expenses for depreciation and emergency in 4-1/2 years. Had such expenses not been so charged, there would have been no deficit in 1950, 1960 and 1962.

Since the Authority decided to set rates for water and steam sold to National by contract for a 25-year period, the Authority was obligated by § 868, supra, when the contract was negotiated to establish rates which would be reasonable and nondiscriminatory and which it then determined would be sufficient to produce revenue adequate to pay operation and maintenance expenses, to pay interest and principal on bonds, to pay sinking and reserve fund payments, and to fulfill the terms of any agreements with bondholders. In other words the Authority was obligated at the time the contract was entered into to determine what rates in its considered judgment would be adequate to meet the requirements of § 868 during the term of the contract and fix the applicable rates accordingly. Presumably it performed that duty and made such determination, and the fact, if it be a fact, that actual experience has shown the prospective determination of the rates, although fully adequate at the beginning of the contract term, later turned out to be inadequate, does not retroactively make the initial determination improper or unlawful and does not render void the contract rates.

National contends the action of the Authority was an impairment of its contract. We do not think the question of impairment of contract is involved. In its usual connotation, impairment of contract means impairment by legislative action. No such action has occurred. The issue rather is one of simple breach of contract.

We conclude the Authority had the power to fix rates for water and steam for a definite term and to contract to furnish water and steam for such period at such fixed rates.

Affirmed.

Judgment

Sixteenth Day, September Term, Wednesday, October 6th, 1965.

Before Honorable Orie L. Phillips, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Order Denying Petition for Rehearing

Second Day, November Term, Tuesday, November 16th, 1965.

Before Honorable Orie L. Phillips, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

**Section 8 of the Grand River Dam Authority Act,
Okl. Session Laws 1935, Ch. 70, P. 354,
82 Okl.St.Ann. §868**

Section 8. Rates and Charges—Fees.

The Board shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate:

(a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

(b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

(c) To pay all sinking fund and/or reserve fund payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable; and

(d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in subparagraphs (a), (b), (c), and (d) above, the Board shall establish a reasonable depreciation and emergency fund, and retire (by purchase and cancellation or redemption) bonds issued under this Act, or apply the same to any corporate purpose. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act.

Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c), and (d) of this Section 8, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JAN 2 4 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. 830

GRAND RIVER DAM AUTHORITY, a Body Corporate,
Petitioner,

vs.

NATIONAL GYPSUM COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING CERTIORARI

Remington Rogers,
Counsel for respondent

1311 Petroleum Club Building
Tulsa, Oklahoma—74119

Of Counsel:
Gerard K. Donovan
Dan A. Rogers

1311 Petroleum Club Building
Tulsa, Oklahoma — 74119

INDEX

INTRODUCTION

Conformance with Rule 40 ____ 1

Supplemental Statement of the Case ____ 2-4

Summary of Argument ____ 4

THE ARGUMENT

PROPOSITION I. THE RULING OF WHICH PETITIONER COMPLAINS WAS INVITED; CORRECTLY CLASSIFIES TWO OF PETITIONER'S ACCOUNTS; CORRECTLY CONSTRUES THE STATUTE UNDER OKLAHOMA LAW; CERTIORARI WILL NOT ISSUE TO REVISE THE SAME ____ 5

A. The ruling was invited by petitioner's defense 6

B. The ruling is one of classification and correctly classifies petitioner's depreciation and emergency accounts ____ 8

C. Under Oklahoma rules of statutory construction, the court correctly construed the statute as to these two accounts ____ 12

D. Certiorari is neither the proper remedy nor appropriate ____ 14

PROPOSITION II. THE CONSTITUTION DID NOT PROHIBIT PETITIONER FROM FIXING ITS RATES BY CONTRACT. THE STATUTE AUTHORIZED PETITIONER TO DO SO, AND THE RATES ARE VALID ____ 16

A. Preliminary Statement ____ 16

B. Neither the State's power to regulate public service charges nor the Constitutional provi-

sion cited by petitioner has any relation to this case 17

C. Petitioner had legal capacity and authority to enter into the contract and is bound by the terms thereof 20

D. Petitioner's rebuttal of implied admissions is contrary to the facts and without support 26

PROPOSITION III. PETITIONER'S FOREBODINGS AS TO THE CONSEQUENCES OF THE DECISION ARE UNWARRANTED 29

A. The decision too limited in scope for ominous consequences 29

1. Classification of consequences 29

2. The ruling relates only to the revenues for two accounts 29

B. Petitioner's debt structure is not imperiled 30

C. Petitioner's rate structure is not endangered 31

CONCLUSION 33

TABLE OF CASES AND STATUTES

Choctaw Brick Co. v. Townsend, 108 Okl. 235, 236 Pac. 46 20

City of Tulsa v. Midland Valley R. Co., 168 Fed. 2d 252 13

Gates v. Easter, 354 Pac. 2d 438 12

Grand River Dam Authority v. National Gypsum Co., 352 Fed. 2d 130, 131, 132 ..... 1, 6, 9, 14, 17, 24

Petition of Grand River Dam Authority, 320 Pac. 2d 706 ..... 25, 31

Simmons v. Benson, 206 Okl. 539, 244 Pac. 2d 1126 13

Oklahoma Constitution.

Article II, Section 31 ..... 2, 20

Article IX, Section 18b 2, 18

Article XVIII, Section 7 ..... 1, 2, 18

Oklahoma Statutes.

Senate Bill 71, 1949 Session Laws 2

1955 and 1957 Amendments 2

12 O. S. 1651, et seq. 2, 30

17 O. S. 151 & 152 2

82 O. S. 861 ..... 2, 20

82 O. S. 862 ..... 2, 19, 20, 21

82 O. S. 868 ..... 2, 5, 8, 19, 22

82 O. S. 882 ..... 2, 30

APPENDIX 34-44

IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. 830

GRAND RIVER DAM AUTHORITY, a Body Corporate,
Petitioner,

vs.

NATIONAL GYPSUM COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT

Introduction.

In conformity with Rule 40, Respondent shows

(a) Since the petition for writ of certiorari was filed, the opinion of the Court of Appeals has been published. See *Grand River Dam Authority* v. *National Gypsum Company*, 352 F. 2d 130. (Now in advance sheet #2 dated December 20, 1965)

(c) Petitioner has quoted a part of *Oklahoma Constitution, Article XVIII, Section 7.* We quote the entire section (Appendix 3).

Respondent relies on and will cite Constitutional and statutory provisions as follows:

Oklahoma Constitution, Art. II, Sec. 31	Appendix 1
Oklahoma Constitution, Art. IX, Sec. 18(b)	Appendix 2
Oklahoma Constitution, Art. XVIII, Sec. 7	Appendix 3
12 O. S. §1651, §1654 and §1655	Appendix 4
17 O. S. Sections 151 and 152	Appendix 5
82 O. S. Section 861	Appendix 6
82 O. S. 862(n)	Appendix 7
82 O. S. 868	Appendix 8
82 O. S. 882	Appendix 9
1949 Session Laws, Senate Bill 71, Sec. 4	Appendix 10
Oklahoma Session Laws 1955	Appendix 11
Oklahoma Session Laws 1957	Appendix 12

(e) Respondent supplements petitioner's statement of the case by the following additional facts necessary to a clearer understanding of the issues. Petitioner was created in 1935 as alleged by petitioner (Pet. p. 3). By that statute, it was authorized to issue $15,000,000.00 in revenue bonds. In 1941, the Act was amended three times, all consolidated in House Bill 431, slightly changing the District boundaries and eliminating the original prohibition against retail marketing. (Amendments noted but not pertinent to issues.) In 1949, the Act was substantially amended (Senate Bill 71, Appendix 10). The boundaries were slightly changed. The powers, rights and privileges of the District, as set forth in Section 862, were reenacted. The authorized bonded indebtedness was increased to $25,000,000.00 and an additional $25,000,000.00 authorized with the provision (Section 4) that the Authority

should use not more than $7,000,000.00 of the bond proceeds to acquire a steam powered electric generating plant constituting a part of the Oklahoma Ordnance Works.

Until petitioner acquired and commenced operating the steam power plant, it had no steam for sale. It had untreated water from the river and lake for use by municipalities and for irrigation purposes, but it had no treated water. With the acquisition and operation of the steam power plant and related facilities, the Authority, for the first time, was producing steam and had industrial water available for sale. This was the status of petitioner when it entered into the contract involved in this law suit. This contract was elaborate, and apparently carefully drawn. (R. pp. 6 to 19, supps. as to steam R. 20, 21). As appears from the recitals therein, (R. 6), respondent was induced to plan, construct, maintain and operate an industrial plant adjacent to petitioner's steam plant property. Petitioner had numerous municipal customers for electric energy.

To generate electricity at the Oklahoma Ordnance plant, petitioner had to produce quantities of steam. At that time petitioner had no market for this steam. It was a waste by-product, surplus to its needs, and respondent was its first customer. (R. 64)

Since 1949 the Grand River Dam Authority Act was amended in 1955 (Appendix 11) and in 1957. (Appendix 12) The opinion of the Court of Appeals adequately summarizes the pleadings, quotes verbatim the salient parts

of the contract and details acts showing petitioner's administrative construction of its powers. To avoid repetition respondent adopts the same as part of its supplemental statement of the case.

Summary of Argument—Certiorari Should Not Issue Because

The ruling complained of does not impair petitioner's power to establish reserves. It merely classifies two of petitioner's accounts and correctly applies thereto the statute specifying the revenues to establish same. Certiorari is not an appropriate remedy when no effective decision can result.

Petitioner had the power to make the contract. The Constitution did not prohibit or even relate to petitioner's power to fix rates by contract. The statute did not prohibit petitioner from so doing but gave petitioner plenary power to select methods of attaining statutory objectives. The rates are valid.

The direful consequences of the decision forecast by petitioner cannot be affected by certiorari. If not imaginary, they flow from petitioner's own violation of the law, and petitioner has adequate, appropriate and effective remedies.

THE ARGUMENT

Petitioner has grouped its reasons for obtaining certiorari under three lettered headings. We respond to reason A (Pet. p. 8), as follows:

PROPOSITION I

THE RULING OF WHICH PETITIONER COMPLAINS WAS INVITED; CORRECTLY CLASSIFIES TWO OF PETITIONER'S ACCOUNTS; CORRECTLY CONSTRUES THE STATUTE UNDER OKLAHOMA LAW; CERTIORARI WILL NOT ISSUE TO REVISE THE SAME.

Petitioner emphasizes (Pet. pp. 7 and 9) that its first reason is its principal basis for claiming any right to certiorari. This first reason does not relate to the decision of the Court of Appeals, but is based only on a ruling in the opinion.

The Ruling. Petitioner fails to cite us to the particular ruling to which it objects. If we understand the contention correctly, the ruling appears as follows:

Section 8 of the Grand River Dam Authority (82 O. S. 868, Appendix 8) authorizes petitioner to establish rates and charges for purposes specified in four lettered sub-paragraphs. Only sub-paragraph (d) is involved herein. It reads in part:

> "(d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c)

> and (d), above, the Board shall establish a reasonable depreciation and emergency fund, . . ."

Applying this sub-paragraph to petitioner's contingency and depreciation accounts, the Court of Appeals said (Appendix to petition A-13, last paragraph; also 352 F. 2d 132, L. C. 137):

> "It should be noted that Section 868, *supra*, permits the establishment of depreciation and emergency funds only out of revenues . . . in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d) . . .".

The Issues. Petitioner complains that this ruling was volunteered by the court *sua sponte*, and that petitioner has had no hearing thereon. Respondent says the ruling was invited by petitioner's defense. Petitioner says the ruling challenges its right to establish accounts under its bond indentures. Respondent says the ruling merely classified these two particular accounts, regardless of any bond indenture, and that the ruling is a correct construction of the statute. Petitioner asks certiorari because the ruling was outside of the issues. Respondent says certiorari will not issue to reverse *obiter dictum* and could not give petitioner the relief petitioner seeks.

A. THE RULING WAS INVITED BY PETITIONER'S DEFENSE.

Petitioner relied on the particular defense that because of insufficiency of its revenues, it had the power to breach its contract with respondent.

1. *Respondent raised no issue as to the sufficiency of petitioner's revenues.* Respondent sued on a written

contract; alleged breach thereof by petitioner; prayed recovery of payments made in excess of the contract rates; and for specific performance of the contract. (Complaint, Rec. 1). The sole issue was that the contract rates were valid, and that petitioner had no power to alter the same. (Note 1).

2. *Petitioner's defense injected issue of revenue sufficiency.* Petitioner admitted the contract and its collections in excess of the contract rates. (Answer, Rec. 31). By way of avoidance, petitioner contended that under particular circumstances, it would have unilateral power to change the contract rates; that these particular circumstances had occurred in 1960 and 1964. The particular circumstance on which petitioner relied was that, in those years, its revenues had become insufficient to meet the objectives of the statutory sub-paragraphs (a), (b), (c) and (d). Insufficiency of revenue was the very foundation of petitioner's asserted power to alter the rates. It was not the Court, but the petitioner, who injected the question of the sufficiency of its rates.

3. *Petitioner failed to establish facts necessary for avoidance.* Petitioner's defense was predicated on a show-

---

Footnote 1. Petitioner implies that respondent had at some time changed its position or had tendered some different issue. Thus petitioner says (Pet. p. 5):

> "When it became apparent that respondent's claim was based solely on the question of petitioner's power under any circumstances to make any changes in the rates . . ."

Petitioner also says (Pet. p. 16):

> "When respondent took the position in the District Court that the only question involved was the legal right of petitioner to change rates, . . ."

This was the only issue raised by the complaint. Respondent has never taken any other position.

ing that its rates had become inadequate. It submitted no proof that this particular circumstance had, in fact, occurred. It offered proof (Affidavit R. 32), that its Board of Directors had adopted resolutions (Rec., pp. 33 and 41), establishing new rate schedules in 1960 and 1964, based on findings of petitioner's staff. (l. c. R. 35, last two paragraphs and R. 43, 3rd and 4th paragraphs). This, of course, was rank hearsay. The Court of Appeals properly ignored the same.

Since the ruling was part of the Court's response to petitioner's contention that its rates had become insufficient, it was invited by petitioner, and was not "volunteered" by the Court of Appeals.

B. THE RULING CORRECTLY CLASSIFIES PETITIONER'S DEPRECIATION AND EMERGENCY ACCOUNTS.

1. *The Statute.* All agree the controlling statute is Section 8 of the Grand River Dam Authority Act, 82 O. S. 868, (Appendix 8). Therein the Legislature authorized petitioner to establish rates and charges sufficient to produce revenues adequate for the purposes set forth in four lettered sub-paragraphs. No question is presented as to sub-paragraphs (a), (b) and (c). The issue arises from the language of sub-paragraph (d), (Footnote 2),

---

Footnote 2. Petitioner quotes section 8 in its appendix and quotes a portion of the statute (Pet. p. 9). omitting from sub-paragraph (d), the second sentence thereof. We shall avoid confusion by referring only to the complete text (appendix 8). Subparagraph (d) states two purposes as follows:

In the first sentence, petitioner is authorized to establish rates sufficient to fulfill agreements with its bondholders.

In the second sentence, petitioner is authorized and directed to establish a depreciation and emergency fund, out of revenues in excess of those required for other statutory purposes.

quoted above, which authorizes, not one, but two, kinds of reserves.

2. *The evidence.* The Court of Appeals said (*Grand River Dam Authority* v. *National Gypsum Co.*, 352 F. 2d 130, L. C. 137), and petitioner does not deny, that the only evidence in the record was a tabulation of petitioner's revenues and expenses for a five and one-half year period. This tabulation (R. 58) was prepared by petitioner's chief accountant, (R. 60), and was in evidence by stipulation and without objection, (R. 60). Therein we find five columns under the heading "Requirements" which, of course, relate to the requirements of sub-paragraphs (a), (b), (c) and (d) of the statute, and petitioner's footnotes showing its authority for each of these accounts. The opinion omits these footnotes, and we therefore, refer to the tabulation itself. (R. 58).

Sub-paragraph (a) of the statute (Appendix 8) authorized petitioner to collect revenues for operation and maintenance expenses. Petitioner's first column under "Requirements" is headed "Operation and Maintenance (1)", and footnote (1) refers us to this sub-paragraph (a).

Sub-paragraph (b) of the statute authorized an account to pay the principal and interest on outstanding bonds, and sub-paragraph (c) to pay "all sinking fund and/or reserve fund payments agreed to be made . . .". The second column of the exhibit is headed "Debt Service (2)," and footnote 2 refers us to these two sub-paragraphs.

The first sentence of sub-paragraph (d) of the statute authorizes charges "To fulfill the terms of any agreements" made with the bondholders. The third column is headed "Debt Service Reserve Fund (3)" and footnote (3) refers us to sub-paragraph (d) of the statute.

There is no argument or dispute about these first three columns. Petitioner was authorized to collect revenues to pay the operation and maintenance, to pay the debt service, and to pay the debt service reserve fund, respectively, under sub-paragraphs (a), (b), (c) and (d) of the statute. The Court of Appeals did not comment on the third column and was apparently satisfied that it was duly authorized under the first sentence of sub-paragraph (d).

The fourth column is headed "Contingency Fund (3)" (The Court of Appeals deemed a contingency fund the same as an emergency fund). The fifth column is headed "Depreciation, (3)". These are the only two accounts actually involved herein. By footnote (3), both are referred to sub-paragraph (d) of the statute. Petitioner now contends, without record evidence, that these two accounts should, like the third column, be classified as required by its agreement with its bond holders. The Court of Appeals classified these last two columns as showing that petitioner had complied with the second sentence of sub-paragraph (d). Having so classified these columns, the court merely applied the statute thereto. It is not a "ruling", but this classification of which petitioner complains.

It is difficult to see how the Court of Appeals could possibly have classified these two accounts in accordance with petitioner's present contention. The second sentence of sub-paragraph (d) provides that petitioner "shall establish" a depreciation and emergency fund. Excess revenues were apparently available for that purpose. (Footnote 3) Since petitioner had the mandatory duty to establish these accounts, and had funds available for the purpose, it would seem that the Court of Appeals could hardly be criticized for its ruling.

4. There is a presumption that petitioner complied with the law. There was no duty on the part of the Court of Appeals to presume that petitioner had failed to comply with the statute. The Court of Appeals could not have classified these accounts in accordance with petitioner's present contention without imputing to petitioner a violation of its statutory duty to establish these accounts out of excess revenues.

As to petitioner's present depreciation and emergency accounts, it seems clear that the court made the correct classification that these two accounts were established under the second sentence of sub-paragraph (d). Such being the case, the *requirement* that these accounts be established out of excess revenue is not the "ruling" of the court at all. It is the requirement of the statute itself.

Footnote 3. The record shows (R. .....) that for nearly ten years from the date of respondent's contract, petitioner had made no change in its rates, and presumably had excess revenue available for these accounts. In any event, the tabulation showed that excess revenues were produced in 1961.

C. UNDER OKLAHOMA RULES OF STATUTORY CONSTRUCTION, THE COURT CORRECTLY CONSTRUED THE STATUTE AS TO THESE TWO ACCOUNTS.

Petitioner's existing depreciation and emergency accounts were the only accounts before the court. Petitioner's complaint of the ruling, however, is not limited to the court's classification of its present accounts, and the application of the statute thereto. Petitioner complains of the ruling that under the statute these two particular accounts can be established "only" out of excess funds. The proper classification of the two accounts was undoubtedly before the court. Whether these two particular accounts can be established "only" out of excess funds was a question quite unnecessary to the decision. Nevertheless, it was part of the response to petitioner's contentions and is the proper construction of the statute required by Oklahoma law.

1. *Oklahoma rules of statutory construction were correctly applied.* We do not understand that Oklahoma rules of statutory construction are very different from the rules generally followed. Thus, in Oklahoma, there is a presumption that the legislators are acquainted with local conditions and that the Legislature acted on sufficient information to meet the needs of the public.

Gates v. *Easter*, 354 P. 2d 438.

There is thus a presumption that the Oklahoma legislature was duly acquainted with the almost universal business practice of inserting provisions for depreciation and emergency funds in bond indentures; that the statu-

tory provision that petitioner "shall establish" these two funds out of excess revenue, was to meet some need. Such an express specification of the revenues for these two accounts would seem to preclude any authority to petitioner to establish these two particular accounts out of any other revenues, whether by agreement with the bondholders or otherwise. The enumeration of specific powers in a statute operates to exclude those not enumerated.

City of Tulsa, Oklahoma v. *Midland Valley R. Co.*, 168 F. 2d 252, (C. C. A. 10).

In construing the statute, we cannot omit the words "out of the revenues . . . in excess" because, under Oklahoma law, a statute should be construed, if possible, so as to give effect to it as an entirety, and to render every word, phrase and clause operative.

Simmons v. *Benson*, 206 Okl. 539, 244 P. 2d 1126.

Indeed, to construe the statute, as petitioner now contends, would defeat the express and obvious legislative purpose. It would mean that petitioner might create duplicate funds for the same purpose. The statute specifically provides that petitioner "shall establish" a depreciation and emergency fund out of excess revenues. If petitioner, by agreement with its bond holders could bind itself to create such funds for the identical purposes, and to fulfill such agreement, could fix its rates and charges for the payment thereof, petitioner would have two depreciation funds and two emergency funds, one set of each being required by the statute, and the duplicate set being required by its bond indenture. Nothing

in the Act supports a construction producing such an unreasonable result. On the contrary, the rule *"expressio unius est alterio exclusit"*, prohibits any such construction. The legislative requirement that these funds be established out of excess revenues precludes the establishment of duplicate funds or accounts for the same purposes, to be paid out of any other revenues. The ruling of the Court of Appeals that these two funds can be established "only" out of excess revenue is, therefore, the correct construction of the statute. Petitioner's failure to introduce its bond indenture was without legal consequence.

D. CERTIORARI IS NEITHER THE PROPER REMEDY NOR APPROPRIATE.

1. *Certiorari is not proper for the relief sought by petitioner.* Petitioner obviously seeks a decision that it has lawful authority to establish rates sufficient for its depreciation and emergency accounts, not under the statute, but pursuant to agreement with its bond holders. The contrary ruling, made in the three paragraphs of the opinion, *GRDA* v. *National Gypsum Co.*, 352 Fed. 2d 130, appearing at page 137, under West Publishing Company Digest [5] were in answer to, and invited by, petitioner's contention. The classification of petitioner's accounts and the Court's construction of the statute were all correct, but none of these three paragraphs was necessary to the decision that petitioner was bound by its contract. Petitioner seems to feel (Pet. p. 9) that proof that the Court of Appeals "could not, on the record in this case, have decided the question . . .", would entitle

petitioner to certiorari. Such attempt to obtain certiorari to revise *obiter dictum* is novel, quite beyond the purposes for which this Court ordinarily grants the writ; and, from the contention that the ruling was *obiter dictum*, exactly the opposite result would follow.

2. *Certiorari not appropriate.* One of the reasons why certiorari is not granted to revise *obiter dictum* is glaringly obvious in this case. Whether the provisions in petitioner's bond indenture (requiring it to collect rates adequate for its depreciation and emergency accounts) are valid, or whether such clauses conflict with the statute requiring petitioner to establish these two accounts out of excess revenue, is clearly a question not to be adjudicated unless the bond holders or their trustees are parties to the litigation. If certiorari were granted to contradict, revise or completely eliminate this *obiter dictum*, neither this Court, nor the Court of Appeals on remand, could render a judgment giving any legal effect to such adjudication. Any determination, whether affirming, modifying or contrary to the present ruling, would still be *obiter dictum*. It would still be without consequence as to the parties before the Court. It would still not be binding on the bond holders because they are not parties to this litigation.

Certiorari will not issue merely to revise or eliminate *obiter dictum* which correctly states and applies the law when no effective adjudication could follow the issue thereof.

PROPOSITION II

THE CONSTITUTION DID NOT PROHIBIT PETITIONER FROM FIXING ITS RATES BY CONTRACT. THE STATUTE AUTHORIZED PETITIONER TO DO SO, AND THE RATES ARE VALID.

A. PRELIMINARY STATEMENT.

1. *Scope.* Petitioner admits (Pet. p. 7) that except for the matters already answered under our proposition I, the remaining errors complained of would not

> "- - - ordinarily give rise to questions entitled to review - - -."

by certiorari. We agree. These issues have been decided in two courts after full hearing. Nevertheless, in its reasons B and C, petitioner restates all of the matters in controversy and urges (Pet. p. 18) that the Court of Appeals "has so far departed from settled rules of state law" as to justify certiorari. Respondent is, therefore, under obligation to answer the same.

2. *Arrangement.* The bold face headings of petitioner's reasons B, (Pet. p. 11) and C (Pet. p. 15) relate only to subordinate findings of the Court of Appeals, but are used as a tent to cover all of petitioner's contentions. We find no logical relationship between the headings and arguments under each. Some contentions are primary, and some by way of rebuttal only. Under two main headings, we shall answer both of petitioner's primary contentions and group petitioner's rebuttal under a third heading.

B. NEITHER THE STATE'S POWER TO REGULATE PUBLIC SERVICE CHARGES NOR THE CONSTITUTIONAL PROVISION CITED BY PETITIONER HAS ANY RELATION TO THIS CASE.

1. ***Petitioner's business is not subject to rate regulation.*** We are completely at a loss to understand petitioner's criticism (Pet. p. 12) of the findings of the Court of Appeals that

> ". . . Petitioner was not a 'utility' as defined in the statute . . ."

delegating to the Corporation Commission the power to regulate rates. In Oklahoma, the state's police power to regulate utility rates is exclusively vested in the Corporation Commission. For a succinct summary of the Oklahoma law, we quote from the opinion of the Court of Appeals (352 F. 2d, 130 l. c. 136), including the footnote citations:

> "The rates charged by public utilities in Oklahoma are controlled and regulated by the Corporation Commission (5). But the Authority is a 'body politic' (6), and as such it is expressly excluded from the statutory definition of a public utility (7) and its rates and charges are not subject to control or regulation by the Corporation Commission. The only limitations upon the rate making powers of the Authority are those imposed by the Legislature which appear in 82 Okl. St. Ann. §868, *supra.*"
>
> "5. 17 Okl. St. Ann. §152. (Appendix 5)
>
> "6. 82 Okl. St. Ann. §861; (Appendix 6) International Brotherhood of Electrical Workers, Local Union 976 v. Grand River Dam Auth., Okl., 292 P. 2d, 1018, 1019.

"7. 17 Okl. St. Ann. §151." (Appendix 5)

We can only add that a public institution owned and controlled by the State, such as petitioner, is not even within the constitutional definition of a company over which the Corporation has any jurisdiction. Article 19, Sec. 18 (b) of the Oklahoma Constitution provides (emphasis supplied):

> "As used in this article, the term 'Company' shall include associations and joint stock companies having any power or privileges not possessed by individuals and include all corporations *except municipal corporations and public institutions owned or controlled* by the State."

Petitioner is, therefore, expressly excluded from Corporation Commission control. The finding of the Court of Appeals that petitioner is not a utility, as defined in the statute, is incontestably correct.

2. *Constitution does not relate to petitioner's power to fix rates by contract.* Petitioner contends (Pet. p. 12 and 16) that Oklahoma Constitution Article XVIII, Section 7 (Appendix 3), precludes it from making a binding contract to furnish services at contract prices for a definite term, because such a contract would be surrendering the state's power to "regulate" public service charges. This entire article in the Oklahoma Constitution, sections 1 to 7, inclusive, deals only with municipal corporations. In Appendix 3 we quote section 7 in its entirety, not just part of the last sentence. This constitutional provision is dragged into this case only as the result of confusing and equating power to make rates

with the power of rate regulation. The State's power to "regulate utility rates" is one thing. The State's power to fix prices at which the State itself will sell electricity, water, and steam is an entirely different thing. Every utility must, of course, establish the prices and rates at which it will sell its products and services. This is the power of rate *making*. Petitioner has this power. *82 O. S. 868.* This power is an essential of the utility business. It is part of the contractual capacity of the utility. On the other hand, the power to *regulate* rates stems from the State's police power. As demonstrated above, the Corporation Commission is the sole agency of the State of Oklahoma having this power. Nowhere in the statutes dealing with petitioner (82 O. S. 862), and its powers, will the Court find any suggestion that petitioner is given any power to regulate any rates.

All of petitioner's contracts bind it to fixed rates for a definite term, in the very clause reserving the power to alter rates. Such reservation appears in paragraphs 16 and 17 of the contract between petitioner and respondent. (Contract, Rec. 6 to 19, loc. cit. 9 and 10). We quote from paragraph 17:

> "The Authority shall serve written notice upon the Consumer of any change of electric power and energy rates applicable to the Consumer sixty (60) days prior to the effective date of any such change."

Thus, for many years, by administrative construction, petitioner has repeatedly agreed that its established rates are binding upon it for a period of sixty days. No one would dream that this ordinary business provision

would constitute a violation of the Constitution, under the claim that for this sixty day term, petitioner has "surrendered" its power to "regulate" public service charges. Assuredly, if petitioner can constitutionally bind itself to furnish utility services at established contract prices for sixty days, there is nothing in the law to prevent it from so binding itself for a longer term. In neither event is the Constitution violated.

3. *Summary.* The controversy in this case relates only to petitioner's power to make rates. The constitutional provision deals only with rate regulation. Petitioner never had any power to regulate rates. It cannot surrender a power it never possessd. Its defense that its breach of contract was justified as an exercise of its power to regulate rates is without legal support, is contrary to petitioner's own settled practices, and utterly without foundation.

C. PETITIONER HAD LEGAL CAPACITY AND AUTHORITY TO ENTER INTO THE CONTRACT AND IS BOUND BY THE TERMS THEREOF.

1. *State is authorized to conduct business.* The State of Oklahoma has constitutional authority to engage in the utility business. Oklahoma Constitution, Article II, Section 31 (Appendix 1). In so doing, it exercises a proprietary, not a governmental, function.

Choctaw Brick Co, v. *Townsend,* 108 Okl. 235, 236 Pac. 46.

2. *Petitioner* is *state's agency to operate this business.* 82 O. S. 861 and 862. (Appendix 6 and 7). It has

express statutory power to contract. 82 O. S. 862 (n) (Appendix 7).

3. *The contract between petitioner and respondent was fully authorized by circumstances then existing.* In the beginning, petitioner operated only a hydro electric plant at Grand Lake, Oklahoma. By Act of 1949, petitioner was authorized to acquire the steam generating plant from the Oklahoma Ordnance Works (Appendix 10), and thus "firm up" its hydro electric power. At that time it was selling water to the Oklahoma Ordnance Works at cost. (R. 64). As a part and parcel of a transaction in which it sold an industrial site to respondent, Petitioner agreed to furnish respondent's requirements of electric energy, water, steam and compressed air. (Contract, R. 6-21). Respondent was the pioneer first to buy a site, build a plant and rely on petitioner for service. Other industries followed, and petitioner's revenues have increased accordingly.

When petitioner put in operation the O. O. W. Steam generating plant, it had to produce steam. Having no customer for steam, all operating and maintenance costs had to be charged against revenue from the sale of electricity. When Petitioner made the contract with respondent, steam was a waste by-product. Whatever it might receive from respondent for steam was all profit.

In such circumstances, petitioner made the contract at issue. Therein, respondent agreed, for twenty-five years, to buy from petitioner all of its requirements of electricity, water, steam and compressed air. Petitioner therein

agreed to furnish the same. As to electricity, petitioner expressly reserved the power to alter the rates. It reserved no such power as to the contract rates for the other services. For ten years, this contract was duly performed by both parties. Petitioner then attempted to increase the rates for water, steam and compressed air above the contract rates. This litigation followed and petitioner now contends that its officers had no power to make this contract. (Pet. p. 16)

4. *Petitioner had plenary power to fix the steam and water rates by contract.* When the state went into the utility business, the Legislature might, itself, have established the rates. It did not do so. The Legislature established certain standards for the rates and charges and left to petitioner complete discretion in the selection of methods to be followed to achieve such objective. (82 O. S. 868).

The original bonded indebtedness of $15,000,000.00 had been increased to $25,000,000.00 (Appendix 10), when contract with respondent was made. An additional $25,000,000.00 was apparently sold and became an indebtedness in 1960. (R. 58). Since then, the bonded indebtedness has been increased to $110,000,000.00. ((Appendix 12) The state never guaranteed the payment of these bonds, nor did it guarantee that the rates and charges to be fixed by petitioner would be sufficient to meet the bonded indebtedness. In fact, the only pledge by the Legislature to the bond holders was (last paragraph 82 O. S. 868, Appendix 8):

". . . that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges. . . ."

Notwithstanding the tremendous variation in the amounts necessary for operation and maintenance of additional facilities, and to retire bonds in ever increasing amounts, the Legislature has made no change in the authority given to petitioner. What methods petitioner should select to obtain adequate revenues were left exclusively to the choice of petitioner. What classification petitioner should adopt to impose high base rates on industry, low rates on cities and still different rates for R.E.A. electric coops or other utilities, or what means and methods petitioner might adopt to obtain new customers and increase its revenues were at all times matters left in the unrestricted discretion of petitioner. There is no statutory requirement that the rates can be changed on 60 days notice. This is an administrative practice adopted by petitioner. Whether there should be base rates and surcharges, demand charges and monthly minimum payments were all left to petitioner as being best qualified to select the methods to attain the Legislative objectives. With all of the amendments that have been made to the original Act, at no time has the Legislature seen fit to impose any restriction on petitioner's choice of such methods. Petitioner had ample power to insert in any contract the right to alter the contract rates as to one or more of its separate services. It likewise had ample power not to insert such reservations in any contract, or as to any particular srvices.

5. *The contract rates are still binding.* Petitioner apparently admits the contract was valid when executed. We are at loss to understand petitioner's statement (Petition 15, last paragraph) that

> "It contends that the contract rates remained valid at all times until that time *when such rates were no longer adequate to meet the statutory requirements of the Act.* Precisely at that time petitioner had a duty under the statute to make appropriate changes to bring the rates into line with the statutory mandate."

There is no such provision in the statute. A contract binding when executed does not suddenly lose its validity because of one party's need for greater revenue. The authority of petitioner's officers and agents to establish these complicated rates is given by statute. They exercised their discretion. Both parties agreed on the contract rates. They were valid when made. Neither by statute or otherwise, did petitioner have any right to breach the contract.

6. *Petitioner's power to fix rates has been correctly upheld as a matter of statutory construction.* As to petitioner's administrative construction of its powers to fix rates for a definite term, we cannot improve upon the concise language of the Court of Appeals (352 F. 2d 131, l. c. 135, last three paragraphs). To these long years of petitioner's own construction of its power to contract, and to the long years of legislative acquiescence therein, we can now add judicial construction. Both the trial court and the Court of Appeals heard every argument that petitioner now advances. Both courts, without dis-

sent, upheld petitioner's power to make the contract and found petitioner is bound thereby.

In any event, the Supreme Court of Oklahoma has upheld the power of petitioner to enter into a contract fixing rates and expressly answered an argument similar to petitioner's contention that such rates are beyond review. See *Petition of Grand River Dam Authority*, 320 P. 2d 706. In upholding the contract, the Oklahoma Supreme Court said: (emphasis supplied)

> "In the instant case, the Legislature has outlined the policy of the state, and has delegated the authority to contract to the applicant herein.
>
> * * * * * * *
>
> "The wisdom or advisability of making such a contract has had no part in our consideration of its *legality.* Our lack of business experience and capacity in the field of large hydro electric installations precludes an expression of our opinion. *The decision has been made by the Legislature and its duly authorized representatives to whom the power was delegated.*"

7. *There is no unjust discrimination.* Petitioner claims (Pet. p. 16) that the result of the opinion of the Court of Appeals is to force petitioner to maintain discriminatory rates. We do not understand that differences in rates are objectionable when there is a legal basis for classification.

If petitioner can find among its customers an industry which hazarded substantial capital to buy an industrial site from petitioner; which constructed a manufacturing plant thereon in trust and confidence that peti-

tioner would be able to operate its steam generating plant successfully; which agreed to buy and pay for water at fixed rates with monthly minimums when petitioner had no market therefor; which agreed to buy and pay for steam which petitioner had to produce, but which was a waste by-product for which it had no customer or use,—then let petitioner furnish water and steam to that customer at the same rates specified in respondent's contract. It can scarcely be doubted that among the actual facts, petitioner can find good grounds for separate classification of such a customer.

We do, however, resent petitioner's attempt to prejudice this court by its innuendo (Pet. p. 16) that its customers of electricity

> ". . . must unfairly bear the burden of its (petitioner's) losses in furnishing water, steam and air to respondent."

Losses don't result without proof that costs exceed revenue. Nowhere in the evidence is there any statement of the distribution of petitioner's total costs among its separate sales of electricity, water, steam and compressed air. There is not one word of evidence that water, steam and air have been furnished to respondent at any loss whatever.

D. PETITIONER'S REBUTTAL OF IMPLIED ADMISSIONS IS CONTRARY TO THE FACTS AND WITHOUT SUPPORT.

1. ***There is no admission that apart from contract, the petitioner has any power to alter contract rates.*** Petitioner contends (Pet. p. 14) that the parties,—includ-

ing respondent—recognized that petitioner had a duty to change all of its rates. We can impute no legal significance to the word "recognized" unless petitioner means that in some manner, this constitutes an admission against interest by respondent. The contract provision (R. 9, paragraph 16) to which petitioner alludes, expressly provides that electric rates are subject to change subject to the restrictions therein provided. Since the contract contains no similar reservation of power to alter rates for water and steam, it would seem reasonable to construe the contract as meaning that these rate schedules shall not be subject to change.

This contention that the express contract provision that electric rates are "subject to change" constitutes an implied admission that contrary to the contract, the rates for the other services are likewise subject to change, would seem a complete perversion of the contract and quite contrary to the intent of the parties. No such admission can be inferred.

2. *There is no admission from failure to sue.* In footnote #4, (Pet. p. 14), petitioner further contends that respondent's failure to question the increased rates for electricity is an admission by respondent that petitioner's revenues had become insufficient for statutory purposes. It is perhaps possible that under some circumstances, if a party has two causes of action against another, and sues on only one, the failure to sue on the other cause of action might be deemed some sort of admission. No such circumstances are present here. Respondent sued on a written contract, the breach of which

was admitted by petitioner. There could be no denial of the facts, only an attempted confession and avoidance. As to a suit based on electric rates, however, the contract expressly gave petitioner power, under particular circumstances, to change the rates. To have sued petitioner for raising those rates would, therefore, have been an entirely different law suit. It would have involved a protracted and costly investigation of all petitioner's records for the last four or five years. It would have involved a lengthy trial with expert testimony on all of the complex ramifications of a rate regulation suit. We contrast with such an action involving all issues of a complicated rate structure, the simple proposition in this law suit, that petitioner is bound by its written contract. The differences are glaring. It is obvious that respondent's failure to institute, or delay in instituting, litigation as to rates for electricity, cannot possibly be construed as an admission of any kind.

PROPOSITION III

PETITIONER'S FOREBODINGS AS TO THE CONSEQUENCES OF THE DECISION ARE UNWARRANTED.

A. THE DECISION IS TOO LIMITED IN SCOPE TO THREATEN IMPENDING DISASTER.

1. *Classification of Consequences.* All of petitioner's gloomy forecasts of the consequences of the decision and ruling (Pet. pp. 7, 8, 9 and 16) relate to the effect of the decision, either as to petitioner's debt structure or its rate structure. We shall attempt to put these fears in a realistic perspective.

2. *The ruling relates only to revenues for two accounts.* Petitioner shows five different accounts under its "Requirements" (R. 58), the first three of which are entitled "Operation and Maintenance", "Debt Service" and "Debt Service Reserve Fund." None of these accounts is involved in this proceeding. The ruling does not impair petitioner's duty to establish the remaining two accounts, ("Contingency (Emergency) Fund", and "Depreciation"). It merely "notes" that the statute (not the court), requires them to be established out of excess revenues. Nothing else is involved. This designation relating only to the revenues for two authorized accounts can hardly imperil (Pet. pp. 7 & 16) the economic and industrial future of all of Northeastern Oklahoma.

B. PETITIONER'S DEBT STRUCTURE IS NOT IMPERILED.

If, contrary to the ruling of the Court of Appeals, petitioner has legal authority to establish its depreciation and emergency accounts, not out of excess revenues as provided by statute, but under a bond indenture agreement, then its right so to do should be established in some proper proceeding in which the validity of its bond indenture may be determined. It cannot be adjudicated in this case, for want of necessary parties and certiorari is, therefore, not the proper remedy. Petitioner is not without remedy, in a proper proceeding, to obtain that adjudication.

Under Oklahoma law, 12 O. S. 1651 to 1657 (Appendix 4), petitioner may obtain in the District Court a declaratory judgment of its rights and powers. If, in petitioner's opinion, such a proceeding would be too slow to avert catastrophe, then petitioner may institute an original action in the Supreme Court of the State of Oklahoma. 82 O. S. 882 (Appendix 9) provides in part:

> "The District is authorized . . . to file . . . a petition for a judgment determining the validity of any proposed contract or action arising from the exercise of any of the powers, rights, privileges and functions conferred upon the District under this Act; and exclusive original jurisdiction is hereby conferred upon the Supreme Court to hear and determine each such application or petition. It shall be the duty of the court to give such applications and petitions precedence over the other civil business of the court except *habeas corpus* proceedings, and to consider and

pass upon the applications and petitions and any protests which may be filed thereto as speedily as possible."

Petitioner resorted to this procedure in *Petition of Grand River Dam Authority*, 320 P. 2d 706. In that case, the proposed contract was dated August 5, 1957. The Oklahoma Supreme Court's decision followed on December 17, 1957, with all rehearings denied by January 28, 1958. It would therefore seem reasonable to anticipate that in less time than required even to ascertain *whether* certiorari would issue in this case, the petitioner could have obtained a final decision by the Oklahoma Supreme Court, binding on the particular parties whose rights are involved, namely, petitioner and its bondholders.

If the Court of Appeals was correct, petitioner is not entitled to any certiorari. If the ruling was erroneous, certiorari can afford no relief for want of necessary parties. Petitioner has adequate remedies under the above statutes. Its fears as to its debt structure are groundless.

C. PETITIONER'S RATE STRUCTURE IS NOT ENDANGERED.

Petitioner (Pet. p. 16) claims that the opinion "has jeopardized petitioner's entire rate structure . . ." The only alleged grounds are matters entirely outside of the record. Not even in its appendix does petitioner furnish specific references thereto. Obviously, respondent cannot answer claims so presented, nor is answer necessary.

It is common knowledge that in the utility business, no rate schedule balances to the penny the exact require-

ments for any given period. A deficit in one month, may become a surplus the next. In its business, it appears (R. 64), that petitioner has classified its customers as cities, electric coops, other utilities, industries, and others. Petitioner sells electric energy, water, treated water, steam and compressed air. It has base rates, surcharges, demand charges, and minimum monthly payments. How petitioner may justify its discrimination in rates among the various classes of its customers, or how petitioner handles the innumerable conflicting problems of cost accounting, to determine its different base rates for electricity, water or steam, is not in issue. In accordance with its long standing administrative construction of the Act. (Affidavit of Mr. Rohmiller, R 62-63, in evidence by stipulation), petitioner has uniformly reserved the power to alter its rates on sixty days notice in all contracts and as to all products since 1952. If, in any one quarter, or year, or other period, its rate schedule produces revenues in excess of its other authorized statutory requirements, the ruling as to the depreciation and emergency accounts presents no problem. If in any such period, its rate schedule fails to produce adequate revenue, then petitioner need only give sixty days notice of a new rate schedule, which it would deem adequate for the purpose.

Except only as petitioner may be bound by written contract prior to 1952, petitioner has complete power to alter its entire rate structure as to all classes of customers, and all classes of service, at any time on a sixty days notice. As to its rate structure, we suggest that petitioner can meet the shadowy future with complete confidence

in its contractually reserved rights. We express the hope that the Court will not be unduly perturbed by repetitious recitals of fanciful fears when such an effective remedy of self help is immediately at hand.

CONCLUSION

Certiorari should not issue because the decision and ruling of the Court of Appeals were both correct. Nothing in the constitution or in the statute limited petitioner's power or prohibited petitioner from fixing rates by contract. The Court of Appeals correctly applied Oklahoma rules of statutory construction. If correct, certiorari should be denied. If obiter dictum, certiorari will not issue for its correction.

If certiorari were granted, no effective adjudication could result. The exaggerated fears of petitioners as to the dire consequences of the decision are unwarranted, and any consequence can be completely averted by statutory remedies available to petitioner.

Respectfully submitted

Remington Rogers,
Counsel for respondent

1311 Petroleum Club Building
Tulsa, Oklahoma—74119

Of Counsel:
Gerard K. Donovan
Dan A. Rogers

1311 Petroleum Club Building
Tulsa, Oklahoma — 74119

APPENDIX

APPENDIX 1.

OKLAHOMA CONSTITUTION

"Article 2, Sec. 31: State Engagement in Occupation or Business. The right of the State to engage in any occupation or business for public purposes shall not be denied nor prohibited, except that the State shall not engage in agriculture for any other than educational and scientific purposes and for the support of its penal, charitable, and educational institutions."

APPENDIX 2

OKLAHOMA CONSTITUTION, CORPORATION COMMISSION

Article 9, Sec. 18b: *Company defined.* "As used in this article, the term 'Company' shall include associations and joint stock companies having any power or privileges not possessed by individuals, and include all corporations except municipal corporations and public institutions owned or controlled by the State."

APPENDIX 3.

OKLAHOMA CONSTITUTION ARTICLE XVIII, SEC. 7.

This entire article is headed "Municipal Corporations". All of the first six sections of the article deal exclusively with the creation and powers of such corporations. Petitioner quoted only the last sentence of Article 7. To put it in proper perspective, we quote the entire section.

"7. *Control and regulation not divested—Surrender of powers—Exclusive franchises*: No grant, extension or renewal of any franchise or other use of the

streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment.

"Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted."

APPENDIX 4

12 O. S., Chapter 34 "Declaratory Judgments" Sec. 1651, 1654 and 1655.

"§1651. Determination of rights, status or other legal relations. Exceptions.

District and Superior Courts may, in cases of actual controversy, determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of any deed, contract, trust or other instrument or agreement or of any statute, municipal ordinance, or other governmental regulation, whether or not other relief is or could be claimed, except that no such declaration shall be made concerning liability or nonliability for damages on account of alleged tortious injuries to persons or to property either before or after judgment or for compensation alleged to be due under workmen's compensation laws for injuries to persons or concerning obligations alleged to arise under policies of insurance covering liability or indemnity against liability for such injuries. The determination may be made either before or after there has been a breach of any legal duty or obligation,

and it may be either affirmative or negative in form and effect; provided, however, that a court may refuse to make such determination where the judgment, if rendered would not terminate the controversy, or some part thereof, giving rise to the proceeding.

"§1654. Effect of determination—Review.

Any determination of rights, status, or other legal relations shall have the force and effect of a final judgment, and it shall be reviewable in the same manner as other judgments.

"§1655. Further relief.

"Further relief based upon a determination of rights, status, or other legal relations may be granted whenever such relief becomes necessary and proper after the determination has been made. Application may be made by petition to any court having jurisdiction for an order directed to any party or parties whose rights have been determined to show cause why the further relief should not be granted forthwith upon reasonable notice prescribed by the court in its order. Laws 1961, p. 59, §5.

APPENDIX 5. —

Corporation Commission, 17 O.S. Sections 151 and 152.

"§151. Public Utility — Definition — Washington County, special provisions relating to

"The term "Public Utility" as used in this Act shall be taken to mean and include every corporation, association, company, individuals, their trustees,

lessees, or receivers, successors or assigns, except as hereinafter provided, and except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use or may supply any commodity to be furnished to the public.

(Paragraphs not pertinent omitted.)

"§152. Commission's jurisdiction over public utilities.

"The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission. Laws 1913, ch. 93, p. 150, § 2."

APPENDIX 6.

82 O. S. 861. Grand River Dam Authority, a body politic.

"There is hereby created within the State of Oklahoma a conservation and reclamation district to

be known as "Grand River Dam Authority" (hereinafter called the District), and consisting of that part of the State of Oklahoma, which is included within the boundaries of the counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Tulsa, Wagoner, Sequoyah, McIntosh, Creek, Okmulgee and Rogers. Such district shall be, and is hereby declared to be a governmental agency, body politic and corporate, with powers of government and with the authority to exercise the rights, privileges and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes and reclamation and irrigation of arid, semi-arid and other lands needing irrigation, and the conservation and development of the forests, water and hydroelectric power of the State of Oklahoma.

"Nothing in this Act, or in any other Act or law contained, however, shall be construed as authorizing the District to levy or collect taxes or assessments, or to create any indebtedness payable out of the taxes or assesments, or in any manner to pledge the credit of the State of Oklahoma, or any subdivision thereof.

(paragraphs not pertinent omitted)

APPENDIX 7.

82 O. S. 862. Grand River Dam Authority, powers.

§862. Powers, rights and privileges of district.

"The District shall have and is hereby authorized to exercise the following powers, right and privileges

(paragraphs not pertinent omitted)

"(n) To make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act; . . ."

APPENDIX 8.

82 O. S. §868. Grand River Dam Authority, power to fix rates.

"§868. Board authorized to fix and collect rates and charges—State's power to fix charges not to impair contracts.

"The Board shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate:

(a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

(b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

(c) To pay all sinking fund and/or reserve fund payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable; and

(d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which

may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d), above, the Board shall establish a reasonable depreciation and emergency fund and retire (by purchase and cancellation or redemption) bonds issued under this Act, or apply the same to any corporate purpose. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act.

"Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c) and (d) of this Section 8, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceeding by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged. Laws 1935, p. 354 §8."

APPENDIX 9.

82 O. S. 882. Grand River Dam Authority, Petition to Oklahoma Supreme Court.

§882. Judicial determination by Supreme Court of Validity of bonds, contracts and other acts — Notice.

"The District is authorized in its discretion to file an application with the Supreme Court of Oklahoma for approval by said court of any bonds to be issued under this Act, or to file a petition for a judgment determining the validity of any proposed contract or action arising from the exercise of any of the powers, rights, privileges and functions conferred upon the District under this act; and exclusive original jurisdiction is hereby conferred upon the Supreme Court to hear and determine each such application or petition. It shall be the duty of the court to give such applications and petitions precedence over the other civil business of the court except habeas corpus proceedings, and to consider and pass upon the applications and petitions and any protests which may be filed thereto as speedily as possible.

(sentences not pertinent omitted) and concluding

* * * * * * *

". . . and any declaratory judgment on any contract or action of the District entered pursuant to this section shall have the force and effect of a final judgment or decree. Laws 1957, p. 568, §4."

APPENDIX 10.

1949 Session Laws, Senate Bill #71 amending 82 O. S. 861, *et sequente.*

(Omitting re-enacted sections not here pertinent.)

Section 4 amends 82 O. S. 870 to read, in part as follows:

Section 870.

"The District shall have power and is hereby authorized to issue from time to time, bonds for corporate purposes, of not to exceed Twenty-Five Million Dollars ($25,000,000.00) and without limitation of the generality of the powers, rights and privileges heretofore granted, for acquiring a steam generating plant and related facilities located at the Oklahoma Ordnance Works near Choteau, Oklahoma, and to extend, improve and reconstruct the same. The District shall have power and is hereby authorized to issue additional bonds of not to exceed Twenty-Five Million Dollars ($25,000,000.00) which bonds may be issued from time to time as the need (thereof) arises and in such amounts as are deemed necessary, for constructing, installing or acquiring dams and/or hydroelectric power plants at Markham's Ferry and/or Fort Gibson, and for acquiring transmission lines, substations, and for acquiring additions and improvements to and extensions of the present existing facilities of the District, and the acquisition of lands and rights of way for such use as is, or may be, authorized by law, for construction or replacement and repair of any dams, plants or other facilities of the District, and to enable it to finance in cooperation with any other agency of government, the development and utilization of the water resources and rights in waters vested in said district for such purposes as are, or may be, authorized by the laws of Oklahoma, and for financing and refinancing present outstanding obligations of the District, including the payment of any claims, charges or interest on bonds required to be paid.

(Omitting sentences not pertinent).

". . . provided that out of the issue of any bonds hereinabove authorized the Authority shall not use or apply more than Seven Million Dollars ($7,000,000.00) of the proceeds of such bonds for the acquisition or additions to that certain steam driven electric generating plant located at and constituting a part of the Oklahoma Ordnance Works near Choteau."

APPENDIX 11.

Oklahoma Session Laws 1955, page 474, Sections 1, 2 and 3.

This Act amended 82 O. S. 863, as to the Directors of the G.R.D.A.; 82 O. S. 866, as to its office, accounts, audits and public inspection, and 82 O. S. 874 prohibiting any mortgage, sale or lease of petitioner's property.

Since there is no dispute, the amendments are noted, but are not reproduced herein.

APPENDIX 12.

Grand River Dam Authority.

Oklahoma Session Laws 1957, page 562, Sections 1, 2, 3 and 4 and joint resolution, laws of 1957, page 656, Sections 1 to 4.

By these sections in 1957, the Oklahoma Legislature amended the Grand River Dam Authority Act, Title 82, Sections 861, 862 and 865. It also amended Section 870 in 82 O. S. 870, reading in part:

"§870. District authorized to issue bonds, Provisions of resolution or agreement — Approval by Attorney

General — Registration — Acquisition of plant from United States. —

"The District shall have power and is hereby authorized to issue from time to time, as the need thereof arises, bonds for corporate purposes of not to exceed One Hundred Ten Million Dollars ($110,000,000.00), . . ."

The 1957 Legislature also amended 82 O. S. 874, omitted because not pertinent to this case. It also created an advisory committee to review proposed contracts with privately owned public utilities. 82 O. S. Sections 883-886, inclusive. Contents not material to this action, but facts of amendment noted.